

No. 77-1476

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1977

ATLANTIC PRODUCE COMPANY, INC., PETITIONER

v.

**UNITED STATES OF AMERICA AND
THE SECRETARY OF AGRICULTURE**

**ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT**

**BRIEF FOR THE RESPONDENTS
IN OPPOSITION**

**WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.**

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 22a-23a) is not reported. The decision and order of the Secretary of Agriculture (Pet. App. 19a-21a) are reported at 35 Agr. Dec. 1631. The decision of the administrative law judge (Pet. App. 1a-18a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on January 17, 1978. The petition for a writ of certiorari was filed on April 17, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether Section 8(b) of the Perishable Agricultural Commodities Act, 7 U.S.C. 499h(b), unconstitutionally deprives petitioner's former president of future employment opportunities.

STATEMENT

Petitioner was licensed as a fruit and vegetable dealer under the Perishable Agricultural Commodities Act, 46 Stat. 531, as amended, 7 U.S.C. 499a *et seq.* Section 2(4) of that statute, 7 U.S.C. 499b(4), requires dealers to "make full payment promptly" in transactions involving perishable agricultural commodities. The Secretary filed a disciplinary complaint charging that petitioner had failed to make prompt payment to several creditors from whom it had purchased numerous shipments of fruits and vegetables.

After a hearing, an administrative law judge found that petitioner had committed the violations charged (Pet. App. 1a-18a). On administrative review, the Secretary, acting through his Judicial Officer, adopted the decision of the administrative law judge (Pet. App. 19a-21a). As a sanction, the Secretary ordered the publication of the facts and circumstances of petitioner's violations, as provided in Section 8(a) of the Act, 7 U.S.C. 499h(a). The court of appeals affirmed, observing that its decision did not prejudice the rights of any person who may be subject to sanctions because of his connection to petitioner (Pet. App. 22a-23a).

ARGUMENT

In pertinent part, Section 8(b) of the Act provides that, except with the approval of the Secretary, licensees under the Act may not employ any person "responsibly connected" to a person found to have committed flagrant or repeated violations of Section 2. Section 1(9) of the statute, 7 U.S.C. 499a(9), defines the term "responsibly connected" to mean

affiliated or connected with a commission merchant, dealer, or broker as (A) partner in a partnership, or (B) officer, director, or holder of more than 10 per centum of the outstanding stock of a corporation or association * * *.

Under Section 8(b), one year must pass following a finding of flagrant or repeated violation of Section 2 before the Secretary may approve a licensee's employment of a person "responsibly connected" to the violator. At that time, the Secretary may approve such employment only if the employer-licensee furnishes a surety bond satisfactory to the Secretary guaranteeing that the employer's business will be conducted in accordance with the Act. Two years after a finding of flagrant or repeated violation, a surety bond is no longer a prerequisite for the Secretary's approval of a licensee's employment of a person "responsibly connected" to the violator. Licensees who employ such "responsibly connected" persons without the Secretary's approval are subject to suspension or revocation of their licenses if they retain the employees after notice from the Secretary.

At the time petitioner violated Section 2(4) of the Act, Louis Friedman was petitioner's president and general manager. He also owned 25 percent of petitioner's corporate stock. He was thus "responsibly connected" to petitioner within the meaning of Section 1(9). Petitioner is defunct (Pet. 12; Pet. App. 5a-7a), and Friedman apparently has obtained employment with another firm licensed to do business under the Act (Pet. App. 7a). Petitioner now contends (Pet. 6-12) that Section 8(b) deprives Friedman of due process of law by seriously diminishing his prospects for continued employment with a licensee after appellate review of the Secretary's decision is completed. Petitioner argues that Friedman was not a party to the administrative proceedings at which

petitioner was found to have flagrantly and repeatedly violated Section 2,¹ and that therefore Friedman should not suffer adverse consequences as a result of the Secretary's decision.

The court of appeals correctly rejected petitioner's argument. In the first place, petitioner may not challenge the constitutionality of Section 8(b) on the basis of the statute's potential effect on Friedman. The alleged injury of which petitioner complains will affect only Friedman and will involve no harm whatever to petitioner. Petitioner is no longer an active corporation licensed to deal in perishable agricultural commodities and, accordingly, does not itself have an interest in employing Friedman. Petitioner has asserted no other stake in the validity of Section 8(b) and therefore may not attack the statute in this case.

Moreover, petitioner's objections to the statute are groundless. The administrative law judge found that, during the nine-month period from August 1972 to April 1973, petitioner purchased and received 65 lots of fruits and vegetables from seven sellers. The total contract price for these perishable commodities was nearly \$30,000. Petitioner failed to make full payment to six of the seven sellers and finally went out of business in April 1973.² After petitioner assigned its assets to a trustee for the benefit of creditors, the six sellers received approximately one-third of the amount due and unpaid at

¹Friedman did appear and testify as a witness for petitioner at the administrative hearing (Pet. App. 7a).

²Under the arrangements between petitioner and the sellers, and under the Secretary's regulations (7 C.F.R. 46.2(aa)), full payment was to be made within ten days after acceptance of the produce. Evidence adduced before the administrative law judge indicated that at least some sellers considered payment within 30 days acceptable (Pet. App. 5a).

the time the trustee was appointed (Pet. App. 4a-5a). Petitioner does not challenge any of these findings, and they are sufficient to establish flagrant and repeated violations of the prompt payment provision in Section 2(4). See *Zwick v. Freeman*, 373 F. 2d 110 (C.A. 2), certiorari denied, 389 U.S. 835; *George Steinberg and Son, Inc. v. Butz*, 491 F. 2d 988 (C.A. 2), certiorari denied, 419 U.S. 830; *In re Harrisburg Daily Market, Inc.*, 20 Agr. Dec. 955, affirmed *sub nom. Harrisburg Daily Market, Inc., v. Freeman*, 309 F. 2d 646 (C.A. D.C.), certiorari denied, 372 U.S. 976.³

Friedman did not attempt to intervene in this case. One court of appeals has suggested that a person who may be "responsibly connected" to an alleged violator of Section 2 should be given an opportunity to defend against charges of repeated and flagrant violation, especially in situations where the alleged violator chooses not to assert any defense on its own behalf. See *Quinn v. Butz*, 510 F.

³Petitioner argues (Pet. 13-14) that it made "full" prompt payment to its creditors, within the meaning of the statute, when the creditors accepted partial payment from the trustee several months after petitioner received the fruit and vegetables it had ordered. This contention is without merit. See *Zwick v. Freeman*, *supra*; *Marvin Tragash Co. v. United States Department of Agriculture*, 524 F. 2d 1255 (C.A. 5).

Petitioner also maintains (Pet. 12-13) that the Secretary was foreclosed from pursuing disciplinary action against it because its license to do business under the Act had expired before the Secretary filed his complaint. This argument is incorrect. See *Quinn v. Butz*, 510 F. 2d 743 (C.A. D.C.); *Fruit Salad, Inc. v. Secretary of Agriculture*, 451 F. 2d 162 (C.A. 1). If, as petitioner asserts, it has no future interest in the business, it could have no reason to contend that administrative proceedings must abate on expiration of its license. The Secretary, on the other hand, has a substantial interest in resolving allegations of misconduct, particularly when the corporation or its principals may seek to reenter or remain in the regulated industry; persons who intend to retire from the agricultural commodities business may change their minds.

2d 743, 751 (C.A. D.C.). Significantly, neither petitioner nor Friedman has identified any defense that was omitted and that might have been advanced if Friedman had been a party to the administrative proceedings.

What is more, any disputed questions concerning the nature of Friedman's relationship with petitioner remain open, and Friedman is free even now to show that he was not "responsibly connected" to petitioner. The court of appeals in *Quinn* held that even a person who falls squarely within the statutory definition of "responsibly connected" must be permitted to present evidence intended to prove lack of actual responsibility for violations of the Act. In response to the *Quinn* decision, the Secretary has established a hearing procedure designed to determine whether a person is in fact responsibly connected to a licensee under the Act. See 7 C.F.R. 47.47-47.68. Friedman has not sought to avail himself of this procedure, and he has not denied his responsible connection to petitioner.⁴

In affirming the Secretary's order in this case, the court of appeals emphasized that its decision should not be understood to "prejudice the rights of Louis Friedman or any other individual against whom the Secretary might seek to impose the penalty of prohibition of employment in the industry under the provisions of Section 8(b) of the

⁴The rules of practice governing evidentiary hearings on responsible connection were not in effect when the administrative complaint was issued in this case, but they were in place before the Secretary announced his decision. Shortly after the complaint was issued (despite the fact that the rules had not yet been formally promulgated), Friedman received written notice that he would be permitted to present evidence on his own behalf to agency officials. See Brief for Respondents in the court of appeals, at page A-7.

Act * * * (Pet. App. 23a). Friedman thus has not been deprived of a meaningful hearing on any issue relevant to the statutory restrictions on his future employment.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

JUNE 1978.